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EMRAIL SDN BHD & ORS v. KUWAIT FINANCE HOUSE (MALAYSIA) BHD

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COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
AZIZAH NAWAWI JCA
AHMAD NASFY YASIN JCA
[CIVIL APPEAL NO: W-02(IM)(MUA)-648-06-2020]
9 SEPTEMBER 2021

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Abstract – *By virtue of s. 44 of the Courts of Judicature Act 1964, the Court of Appeal is vested with the power to make an 'interim order to prevent prejudice to the claim of parties' pending the hearing of the appeal. Unless there are limits specified in the statute for the exercise of the power, there is no reason for the provision to be read or implied to limit that power. The refusal of an Erinford injunction at the court below could not ipso facto operate as a bar to an application under s. 44 of the Courts of Judicature Act 1964 at the Court of Appeal. The power is always exercisable when the circumstances are fit and proper.*

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CIVIL PROCEDURE: *Reliefs – Injunctive reliefs – Appeal against – Applicants sought orders pending full trial and disposal of action – Injunction against bank from classifying and reporting company's account with bank as Special Attention Account under Central Credit Reference Information System with Bank Negara Malaysia – Injunction against bank from calling event of default and/or insisting on full payment of facilities – Injunction against bank from proceeding with claim if bank had called event of default and/or demanded full payment of facilities – Whether applicants would suffer great injustice and prejudice if interim orders not made – Whether granting of interim orders would open floodgate for all other defaulters as each case would have to turn on its facts*

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STATUTORY INTEPRETATION: *'interim order to prevent prejudice to the claim of parties' – Courts of Judicature Act 1964, s. 44 – Power of Court of Appeal – Pending hearing of appeal – Whether power circumscribed by any limitation – Whether refusal of Erinford injunction at court below could ipso facto operate as bar to application under s. 44 at Court of Appeal – Whether power ought to be exercised*

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The second to fourth appellants were the directors of the first appellant, a construction company. *Via* a letter of acceptance, Prasarana Malaysia Bhd ('Prasarana') accepted the first appellant's offer to perform works for the Light Rapid Transit Line 3 Project ('LRT project') for the contract price of RM783,158,714.56. The respondent then granted the first appellant an Islamic financing facility, guaranteed by the other appellants. According to the appellants, (i) the respondent's obligation included the provision of a performance bond, in the prescribed format, to Prasarana to secure performance of the first appellant's works under the LRT project; (ii) the

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respondent, however, refused to issue a compliant performance bond ('compliant PB') on the basis that it was not Syariah compliant; (iii) the respondent only issued a compliant PB after a lapse of nine months from the original deadline; and (iv) the respondent's failure to timeously issue a compliant PB prevented payment to the first appellant for works carried out worth RM59.1 million under the LRT project. This prompted the appellants to commence an action against the respondent premised on a breach of contract, negligence and unconscionable conduct. The appellants prayed for, *inter alia*, (i) a declaration that the respondent was not entitled to call an event of default given its own failure to timeously provide a compliant PB, which led to the non-certification of the first appellant's interim payment applications of up to RM59.1 million which would have extinguished the debt and left a surplus for the first appellant; and (ii) general and aggravated and/or exemplary damages. The appellant applied for the following, pursuant to O. 28 of the Rules of Court 2012, pending the full trial and disposal of the action: (i) orders that the respondent be restrained by injunction from (a) classifying and reporting the first appellant's account with the respondent as a Special Attention Account under the Central Credit Reference Information System ('CCRIS') with Bank Negara Malaysia ('BNM'); and (b) calling an event of default and/or insisting on full payment of the facilities; and (iii) if the respondent had called an event of default and/or demanded full payment of the facilities, that the respondent be restrained by injunction from proceeding with the claim. The High Court held that the appellants were not entitled to the injunctive reliefs prayed for and dismissed the application with costs. The appellants then applied, before the same High Court, for an *Erinford* injunction grounded on the fact that the present appeal had been filed against the dismissal of the injunctive reliefs prayed for and, if there was no injunction given in favour of the appellants pending the disposal of the appeal at the Court of Appeal, that appeal would be rendered nugatory.

Held (allowing appeal)
Per Ahmad Nasfy Yasin JCA delivering the judgment of the court:

(1) In hearing the present appeal, reference may be made to s. 44 of the Courts of Judicature Act 1964 ('CJA') which vested the Court of Appeal with the power to make 'interim order to prevent prejudice to the claim of parties' pending the hearing of the appeal. This power was wide and should not be circumscribed by any limitation that was not specifically stated. There was no logical reason for the Court of Appeal to limit that power. Accordingly, the refusal of an *Erinford* injunction at the court below could not *ipso facto* operate as a bar to an application under s. 44 of the CJA at the Court of Appeal. The power was always exercisable when the circumstances were fit and proper. In the present case, that power ought to be exercised and the court did so. More so in an appeal

from an interlocutory application, the Court of Appeal was certainly entitled to hear the matter afresh by way of re-hearing and, accordingly, the present court has done so. (para 81)

(2) There were issues to be tried. The entire claim by the appellants was not of spurious nature and, based on the examination of the pleadings, the issues raised merited careful consideration. At this juncture, the issues relating to negligence and the breach of contract relating to the issuance of the performance bond were live issues which could not be ignored or brushed aside simplistically either on an entire agreement clause or compliance with BNM's requirements. The argument on the existence of uncertainty, or *gharar*, was yet another issue which had to be decided upon mature arguments and credible evidence. (para 82)

(3) The appellants would suffer great injustice if interim orders were not made. The classification under CCRIS would damage the first appellant's credit rating, its ability to secure project financing and may trigger a cross-default on the appellant's banking lines with various other lenders. When a company's account is classified as a Special Attention Account, no financial institution would afford a company financial loans or assistance which would commercially cripple the company. Thus, it was abundantly clear that the respondent would only suffer a delay in payment which could be compensated by adequate payment as to interest. The granting of interim order would not open a floodgate for all other defaulters as each case would have to turn on its facts. The second to fourth appellants would also be gravely prejudiced if no interim orders were made. The prejudice of these appellants would far outweigh the prejudice of the respondent, which was purely financial, which was computable and capable of being clawed by restitution and compensation in terms of profits unearned. (paras 83 & 84)

(4) The High Court's decision could not be sustained and was therefore set aside. The respondent was restrained, pending the trial and disposal of the appellants' claim in the civil suit, from (i) classifying and reporting the first appellant's account with the respondent as a Special Attention Account under the CCRIS with BNM; and (ii) calling an event of default and/or demanding payment of the Islamic financing facilities. (para 85)

Case(s) referred to:

Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC ***(refd)***

Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd [1993] 2 CLJ 495 SC ***(refd)***

CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor [2019] 2 CLJ 1 FC ***(refd)***

Erinford Properties Ltd v. Cheshire County Council [1974] 2 All ER 448 ***(refd)***

GPQ Sdn Bhd v. Constant View Sdn Bhd [2017] 1 LNS 821 CA ***(refd)***

Malayan Banking Bhd v. Perniagaan Sri Nuranuri Sdn Bhd & Ors [2014] 1 LNS 853 CA ***(refd)***

Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***
Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal [2018] 6 CLJ 683 FC ***(refd)***
Wilson v. Church (1879) 11 Ch D 576 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 44
Rules of Court 2012, O. 29

For the appellant - Lim Chee Wee & Robini Stephanie Sittampalam; M/s Kumar Partnership
For the respondent - Raja Ahmad Mohzanuddin Shah Raja Mohdzan & Mohd Wafiy Azman; M/s Azmi & Assocs

[Editor's note: For the High Court judgment, please see Emrail Sdn Bhd & Ors v. Kuwait Finance House (Malaysia) Bhd [2020] 1 LNS 382 (overruled).]

Reported by Najib Tamby

JUDGMENT

Ahmad Nasfy Yasin JCA:

Introduction

[1] In the court below the plaintiffs (the appellants before us) applied, in encl. 3, pursuant to O. 29 of Rules of Court 2012, seeking the following:

(i) An order that the defendant, KFH, by itself, its directors, servants, agents or otherwise howsoever be restrained by injunction from classifying and reporting the first plaintiff's account with KFH as a special attention account under CCRIS with Bank Negara Malaysia pending the full trial and disposal of the action;

(ii) An order that KFH by itself, its directors, servants, agents or otherwise howsoever be restrained by injunction from calling an event of default and/or insisting on full payment of the facilities pending the full trial and disposal of the plaintiffs' claim; and

(iii) Alternatively, if KFH has called an event of default and/or demanded full payment of the facilities, that KFH, by itself, its directors, servants, agents or otherwise howsoever be restrained by injunction from proceeding with the claim pending full trial and disposal of this claim.

[2] It should be mentioned that the plaintiff's claim in the writ action is premised on a breach of contract, negligence, and unconscionable conduct on the part of the defendant. In essence, it is the plaintiffs' contention that the defendant had been negligent, breached its obligations under the contract entered between the first plaintiff and the defendant and had conducted itself unconscionably when dealing with the first plaintiff as a customer under the Islamic banking facility granted to the first plaintiff in relation to the first

plaintiff's works for a project known as the Light Rapid Transit Line 3 ("LRT") project. The plaintiffs prayed for the following in the writ and statement of claim:

(i) Declaration that the KFH is not entitled to call an event of default given its own failure to timeously provide a compliant performance bond, which led to the non-certification of Emrail's interim payment applications of up to RM59.1 million which would have extinguished the debt and left a surplus for Emrail;

(ii) General damages;

(iii) Aggravated and/or exemplary damages;

(iv) Interest on all sums ordered to be paid at the rate and for the period deemed fit and proper by this Honourable Court; and

(v) Costs.

[3] In respect of damages, the plaintiffs pleaded that they had suffered loss and damage as follows:

(i) RM7.9 million costs;

(ii) RM59.1 million claims to have been certified and paid had KFH timeously issued a compliant performance bond; and

(iii) Loss of reputation, *inter alia* as Emrail was the only works package contractor who had difficulties procuring a compliant performance bond.

[4] The learned Judicial Commissioner having heard, which in essence is the application for injunctive reliefs, found that the plaintiffs are not entitled to the reliefs prayed for and dismissed the application with costs on 13 May 2020. It is to be noted that prior to the dismissal of that application, the plaintiffs had had the benefit of *ad interim* injunction since 31 December 2019.

[5] The record also reflects that the plaintiffs then applied before the same court for what is now commonly known as an *Erinford* injunction grounded on the fact that an appeal has been filed against the dismissal of the injunctive relief prayed for and that if there is no injunction given in favour of the plaintiffs pending the disposal of the appeal at the Court of Appeal, that appeal will be rendered nugatory.

[6] The plaintiffs' application for an *Erinford* injunction did not meet with success. It was dismissed on 23 September 2020.

The Appellants' Appeal Before Us

[7] The appellants against the decision of learned Judicial Commissioner who had dismissed their prayers for the following reliefs:

(i) To restrain KFH from classifying and reporting Emrail's account with KFH as a special attention account under the Central Credit Reference Information System ("CCRIS") with BNM pending the disposal of this action; and

(ii) To restrain KFH from calling an event of default and/or demanding payment of the Islamic Financing Facilities pending the full trial of the plaintiffs' claim.

[8] In short, the grounds are as follows:

(i) Unless otherwise restrained by the court, the respondent will proceed to classify and report the Emrail's account under the CCRIS system of BNM and commence recovery action against the appellants;

(ii) The action(s) by KFH would have serious consequences on Emrail, amongst others:

(a) such classification would have severe consequences on the Emrail's credit-rating and ability to secure project financing;

(b) it will trigger a cross default on Emrail as well as its group's banking lines with financial institutions, including OCBC Al Amin Bank Berhad, CIMB Bank Berhad, Maybank Islamic Berhad and Hong Leong Bank Berhad; and

(c) such clarification would have dire consequences on Emrail which is involved in various national infrastructure projects and is one of the largest private-sector railway construction companies.

(iii) To the other appellants, who are the guarantors such action(s) would, it was canvassed, have the following dire consequences:

(a) with regard to the directorships in public listed companies locally and abroad;

(b) the second appellant, Tun Zaki, may face some professional difficulties, especially in relation to his position as the Chief Justice of Dubai International Financial Centre Courts;

(c) the personal standing of the third appellant, Tan Sri Hari, and the fourth appellant, Amrish as eminent and accomplished members of society and in their chosen careers; and

(d) the guarantors will suffer severe embarrassment and loss of reputation.

[9] The pertinent facts on the need for the injunctive reliefs are set out in the various affidavits filed for the appellants, to which we will allude to in the paragraphs below.

A **Background Facts**

[10] Before we deal with the rival submissions it is instructive to refer to the relevant facts as far as are necessary for the disposal of this appeal. We must be quick to add that given that the facts at this stage come by way of affidavits and not by *viva voce* evidence, we are, sitting at this appellate stage B cannot be deemed to be making any finding of facts. That will be the province and within the domain of the trial court. The facts that we are alluding to below are facts, that we are able to marshal from the affidavit evidence.

C **[11]** The first appellant ("Emrail") is a construction company. It states that it is a rail track solutions provider. The second, third and fourth appellants are Emrail's directors. The defendant is a banking institution.

[12] Prasarana Malaysia Berhad ("Prasarana") is a company wholly-owned by the Government of Malaysia. It is the responsible company to carry out D a project known as Light Rapid Transit Line 3 Project ("the LRT 3 project"). Prasarana carried out a tender exercise for the LRT 3 project and Emrail participated in that tender exercise. By a letter dated 9 January 2017 ("letter of acceptance"), Prasarana accepted Emrail's offer to perform works for the "the LRT 3 project" for the contract price of RM783,158,714.56.

E **[13]** By that letter of acceptance, Emrail undertook to complete, design, manufacture, supply, delivery, installation, test and commission of track works and the power conductor rail system for the LRT 3 project ("the works"). Prasarana at the same time appointed MRCB George Kent Sdn Bhd ("MRCBGK") as the project delivery partner to undertake the design and F construction works of the LRT 3 project.

[14] Among others, the letter of acceptance provides that:

(i) Emrail would accept the authority of MRCBGK on the overall administration and management of all matters connected to the works;

G (ii) Until execution of the articles of agreement ("the articles of agreement") by Prasarana, MRCBGK and Emrail, the letter of acceptance, conditions of contract and other documents (collectively, "the contract") constituted a binding contract between the parties;

(iii) Emrail was required to submit a performance bond for RM39,157,935.73 H to MRCBGK within 21 days of the letter of acceptance, in a format prescribed by MRCBGK; and

(iv) In the event Emrail fails to execute the articles of agreement within three months from the date of the letter of acceptance, MRCBGK shall be entitled to rescind the letter of acceptance.

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[15] Emrail then started to look for financing. It approached the defendant. A lot of communication occurred between the representatives of Emrail and the officers of the defendant. One of the significant events in that communication was on 4 December 2017 by way of email under the header with the words "contract & bonds format" and together with an attachment entitled "form of performance bond" in PDF format. Emrail stated that one of its representatives had furnished to the defendant the letter of acceptance, conditions of contract and appendices in respect of the LRT 3 project ("the project documents"). The defendant on the other hand stated that it was an email without attachment.

[16] Emrail's application for financing facility was successful. By a letter dated 19 January 2018 ("the letter of offer"), the respondent ("KFH") granted Emrail an Islamic Financing Facility comprising the following:

(i) *Murabahah Tawarruq* Working Capital Financing-I (RM46 million);

(ii) *Murabahah* letter of credit/*Murabahah Tawarruq* Working Capital Financing-I (RM224 million);

(iii) *Kafalah* bank guarantee 1 (RM40 million); and

(iv) *Kafalah* bank guarantee 2 (RM20 million) ("the facilities").

[17] Pursuant to the letter of offer, KFH and Emrail executed:

(i) Master facilities agreement ("the facilities agreement");

(ii) *Murabahah Tawarruq* General Working Capital Financing-I (MTQ-1);

(iii) *Murabahah Tawarruq* General Working Capital Financing-I (MTQ-2); and

(iv) *Kafalah* bank guarantee-I (BG-1)(1) and *Kafalah* bank guarantee-I (BG-1(2) (collectively, "the *Kafalah* bank guarantees") all dated 30 January 2018. The executed documents are collectively referred to in the definition of "transaction documents" in the facility agreement.

[18] The facilities were further secured by an assignment of all rights, title and interest in the monies due and owing and by charges by way of a deed of assignment dated 30 January 2018 ("the deed of assignment") over amongst others, proceeds under contract No. Prasarana/GSC/LTT/2.0689/2017 dated 9 November 2017 issued by Prasarana to Emrail and subject to the articles of agreement ("the contract proceeds").

[19] The facilities were also secured by a joint and several personal guarantees and indemnity by the second, third and fourth appellants ("the personal guarantee").

[20] By an email at 5.29pm on 8 February 2018, KFH's representative sent a "KBG Application Form" (referring to the performance bond) for Emrail's further action.

[21] On Friday, 9 February 2018 at 4.55pm, KFH sent an email to Emrail attaching a draft performance bond in a word document format. It says it is drafted based on the form of performance bond requested by Emrail. In that email too, KFH requested for confirmation of the date of the agreement to be entered with Prasarana and MRCBGK, amongst others.

[22] In response, Emrail sent an email dated 9 February 2018, informing the KFH that they were striking out the wording "by an agreement" because the contract for the "letter of award" (referring to the letter of acceptance) had not been executed yet. Emrail's representative stated that it was better to strike out than delete the words to preserve the format of the bank guarantee or the performance bond.

[23] On 13 February 2018, KFH sent the draft performance bond with the details as provided by Emrail. At 8.46pm, Emrail informed KFH that they would check with MRCBGK regarding the proposed amendment to the bond by way of striking through, as stated above.

[24] Next, by another email on 14 February 2018 at 9.37am, an amended draft performance bond was attached wherein the second line of para. (A) the words "(to be advised)" are inserted instead of the actual date of the intended articles of agreement. In that email too, Emrail requested for KFH to proceed with the issuance of the performance bond. At 10.31am on the same day, Emrail instructed KFH to issue a performance bond which had strike through the words "and by an agreement in writing dated the ... day of … 20 …"

[25] On 14 February 2018, Emrail submitted to MRCBGK the performance bond issued by the KFH ("the original performance bond"). By a letter dated 6 March 2018, MRCBGK rejected the original performance bond and requested a performance bond that complied with MRCBGK's requirements. MRCBGK remarked, amongst others, that it was MRCBGK's requirement that the performance bond should state "By a letter of acceptance" dated the 9 November 2017 and by an agreement in writing dated the "(to be advised) (hereinafter referred to as the "contract")" instead of "By a letter of acceptance dated 9 November 2017".

[26] MRCBGK in the same letter also provided Emrail with a specimen Letter of Undertaking to be signed by Emrail stating that Emrail acknowledges the original performance bond as being non-compliant and in consideration of MRCBGK's agreeing to allow to proceed with the execution of the articles of agreement notwithstanding the non-compliant performance bond, Emrail undertakes to provide a fully compliant performance bond as

per MRCBGK's requirements within five days of the execution of the articles of agreement. The letter of undertaking would also state that if Emrail fails to provide the performance bond within the five days as an agreed, MRCBGK reserves the right to withhold all or any payment to Emrail until Emrail provides a fully compliant performance bond as required.

[27] MRCBGK then issued a letter dated 27 March 2018 to Emrail stating that the submission by Emrail of the provisional performance bond *via* Emrail's letter dated 14 February 2018 was acceptable subject to Emrail providing a fully compliant performance bond as per MRCBGK's requirements as stated in its letter dated 6 March 2018.

[28] The articles of agreement were executed by Emrail and MRCBGK on 29 March 2018 and were delivered to Prasarana for its execution.

[29] By a letter dated 9 April 2018, Emrail requested KFH to issue a performance bond that complies with MRCBGK's requirements. Emrail also informed the KFH the following:

(i) KFH will address the issue of the unspecified date of the articles of agreement by delivering the amended performance bond after the execution of the articles of agreement, whereupon the date of the contract will be known;

(ii) Emrail requested for the tenure of the performance bond to be effective from 30 November 2017 to 27 August 2023;

(iii) Upon KFH's approval of the changes to the performance bond as requested, Emrail will return the original performance bond to KFH for cancellation prior to collecting the amended version;

(iv) Emrail had represented to MRCBGK that Emrail shall submit an amended performance bond within five days from the articles of agreement being duly executed; and

(v) The articles of agreement were presently with Prasarana following Emrail's and MRCBGK's execution on 29 March 2018.

[30] Emrail then issued a letter KFH dated 11 June 2018 stating the reasons why MRCBGBK deemed the original performance bond not to be in compliance with that required by MRCBGK and attached MRCBGK's letter dated 27 March 2018 highlighting that MRCBGK had accepted the original performance bond in the interim, on strict condition that a compliant performance bond is issued within five days of signing of the articles of agreement between the Emrail, Prasarana and MRCBG so KFH would be able to include reference to the date in the amended performance bond as the date of the contract. In the letter, Emrail informed KFH that the fulfilment of Payment Milestone No. 1 under the contract was pending as a compliant

performance bond had not been submitted. Emrail also stated that MRCBGK had stated that it would expedite the verification and payment of Emrail's payment application for Milestone No. 1 once a fully compliant performance bond is submitted.

[31] By a letter dated 3 July 2018, MRCBGK notified Emrail to stop all procurements due to an ongoing review of infrastructure projects and scope of works by the Malaysian Government.

[32] By a letter dated 11 July 2018, KFH suspended the facilities until such time when it can be ascertained that the developments do not constitute a material adverse effect on Emrail, citing the fulfilment of a post disbursement condition that the contract agreement (referring to the articles of agreement) be executed on 30 June 2018, being still outstanding and the announcement by the Minister of Finance on the withholding of support for the LRT 3 project.

[33] MRCBGK subsequently issued two letters dated 3 August 2018. In the first letter, MRCBGK notified Emrail to stop all procurements and works due to an ongoing review of infrastructure projects and scope of works by the Government. In the second letter, MRCBGK recorded that until a compliant performance bond is received, Emrail's submission of interim payment applications for works done would not be considered for payment certification.

[34] By a letter dated 25 September 2018, Emrail requested KFH for the immediate issuance of a compliant performance bond as per MRCBGK's requirements to enable MRCBGK to certify payments. This will also enable the payments to be applied towards repayment of the facilities. Emrail further stated that KFH'S failure to issue a compliant performance bond may adversely affect negotiations for the revised LRT 3 project and could cause an event of default entitling MRCBGK to terminate Emrail's appointment.

[35] By a letter dated 28 September 2018, MRCBGK reminded Emrail that a compliant performance bond remained outstanding and repeated their right to withhold payment.

[36] By a letter dated 2 October 2018 from Emrail to KFH, the former recorded that at a meeting between KFH, MRCBGK and Emrail on 28 September 2018, that MRCBGK had clearly stated that the failure to provide a compliant performance bond had prevented the execution of the articles of agreement by Prasarana and certification of payment for works done by Emrail. It was also confirmed by MRCBGK that the articles of agreement must be executed before the current award is rescinded and replaced with a new award from MRCBGK as the project will resume under a turnkey model.

[37] In a letter dated 2 October 2018 to KFH, Emrail repeated its request for the immediate issuance of a compliant performance bond as a further delay would hinder certification of the eighth interim payment application for the sum of RM59,106,314 and will jeopardise the prospect of an award under a revised LRT 3 project.

[38] By a letter dated 24 October 2018, Emrail appealed to KFH to expedite the issuance of a compliant performance bond to facilitate certification of its proposed interim payment application 9 for RM59,106,314. Emrail also mentioned that without a compliant performance bond, Emrail would have to negotiate the terms of the revised contract with MRCBGK from a weakened position due to it being in potential default of its obligation under the present contract.

[39] By letter dated 25 October 2018 to KFH, Emrail recorded that despite repeated letters and meetings, KFH had failed and neglected to issue a compliant performance bond resulting in Emrail being unable to obtain certification for the works and will affect repayment of the facilities despite incurring unnecessary finance cost for non-compliant performance bond. Emrail also demanded a compliant performance bond, reserving its right to take any action against the KFH as it deemed fit.

[40] By a letter dated 9 November 2018 KFH agreed to issue a compliant performance bond that would refer to an agreement "to be dated". KFH also cancelled the unutilised portion and imposed a revised facility limit of RM73.4 million. KFH also stated that the facilities agreement is to be read with the said supplemental letter and shall upon Emrail's acceptance be read as a single integrated document.

[41] On 14 November 2018, KFH issued a performance bond which was compliant to MRCBGK's requirements ("the reissued performance bond") backdated to 14 February 2018. The reissued performance bond contained the words "By a letter of acceptance dated the 9 November 2017 and by an agreement in writing dated the (to be advised)."

[42] Emrail then submitted interim payment application 10 for RM44,329,740 on 27 November 2018 and interim payment application 11 for RM59,106,320 on 26 December 2018 but was informed by MRCBGK that it was not certifying any claims made after September 2018.

[43] By a supplemental letter of offer dated 31 January 2019, KFH imposed on Emrail a *Kafalah* bank guarantee (KBG) commission (a fee imposed by the KFH for the issuance of the performance under the *Kafalah* bank guarantees) for year two payable by 14 February 2019. By a letter dated 31 January 2019, Emrail appealed against the KBG year two commission stating that this was an unnecessary burden on cash flows, particularly as Emrail had continued to meet its monthly obligations. In any event, Emrail proposed the said commissions be paid monthly as a gesture of goodwill.

[44] In an email dated 4 February 2019 from KFH to Emrail, KFH requested for the KBG commission for year two to be paid on or before 14 February 2019 as per the KFH's notification letter to Emrail dated 31 January 2019.

[45] By a letter dated 13 February 2019 to KFH, Emrail recorded that it was not consulted prior to KFH's decision to impose the KBG commission for year two to be payable by 14 February 2019 and again offered to pay the commission *via* monthly instalments.

[46] By a letter dated 21 February 2019, KFH demanded full payment of the KBG year two commission of RM587,369.04 by 28 February 2019 and stated that if the payment remained outstanding after the date, KFH would have no choice but to declare an event of default in accordance with cl. 8 of the facilities agreement.

[47] By a letter dated 22 February 2019, Emrail requested MRCBGK to return the reissued performance bond to avoid incurring KBG charges of RM587,369.04. MRCBGK, by way of its letter dated 27 February 2019 acceded to the request, recording that Emrail would be treated as being in non-compliance of its continuing obligations to provide the performance bond.

[48] By a letter to Emrail dated 7 March 2019, KFH demanded that Emrail show cause as to why an event of default should not be called, stating that Emrail was risking non-payment for the works done and a material adverse effect on its payment will occur arising from its request for the return of the reissued performance bond.

[49] By a letter dated 14 March 2019 from Emrail to MRCBGK, Emrail recorded that whether the contract continues to remain effective until terminated is debatable as MRCBGK has not complied with its continuing obligations under the contract and has treated the contract as no longer operational. Emrail also stated that as it sought the return of the reissued performance bond it carried a significant continuing cost which is an unnecessary expenditure given that MRCBGK intended neither to carry out any further work under the current contract, nor to assess or pay for any claims submitted since September 2018 despite being due.

[50] By a letter dated 15 March 2019 to KFH, Emrail refuted the assertion that the return of the reissued performance bond constituted an event of default or material adverse effect. Emrail recorded that as MRCBGK had not certified the interim payment applications, the return of the reissued performance bond was to avoid unnecessary cost. Emrail stated that the facilities were to be repaid from the contract proceeds and proposed to repay the KFH from the first proceeds of the revised LRT 3 project or from payments made upon termination of the contract.

[51] By a letter dated 22 March 2019 to Emrail, KFH requested for a repayment plan to be submitted for the full repayment of the facilities by 31 December 2019 with the first repayment to be made on or before 2 May 2019 on a worst case scenario basis and that no new contract for the LRT 3 project is executed.

[52] By a letter dated 5 July 2019 KFH informed the Emrail that if a letter of award for the new LRT 3 project is not received by 30 July 2019, Emrail is to provide a payment plan for the entire outstanding by 31 December 2019 and the plan is to be submitted to the KFH by 7 August 2019.

[53] By a letter dated 31 July 2019, KFH informed Emrail that as the new letter of award has yet to be executed, Emrail must provide a payment plan for the entire outstanding sum due on 31 December 2019 by 7 August 2019.

[54] On 13 August 2019, MRCBGK simultaneously issued the notice of termination of the contract and the letter of appointment in respect of the new contract for the LRT 3 project which was conveyed to the KFH by a letter dated 14 August 2019.

[55] By a letter dated 17 September 2019 Emrail updated the progress of the execution of the articles of agreement of the new contract for the LRT 3 project and proposed to KFH that the facilities be settled from proceeds of the new LRT 3 Contract while Emrail continued to service all profit payments in the interim.

[56] By a letter dated 24 October 2019 to KFH, Emrail further updated the progress of the execution of the articles of agreement of the new LRT 3 project contract and notified KFH of the appointment of a subcontractor for procurement and issuance of bonds to expedite settlement to KFH and that 50% of the first RM75 million of the new contract proceeds shall be applied towards settlement of the facilities while Emrail continues to service all profit payments in the interim.

[57] By a letter dated 6 November 2019, KFH reminded Emrail that the entire sum of RM34,799,131.39 would be due and payable on 31 December 2019 and also requested a meeting with the guarantors.

[58] A meeting was held between KFH and Emrail on 25 November 2019 attended by second, third and fourth appellants, guarantors. According to Emrail, it reiterated that it would repay the facilities from the proceeds of the new LRT 3 Contract, by mid-2020 and that a compliant performance bond had been secured and delivered under the LRT 3 project contract. In response to this, KFH rejected Emrail's proposal and informed Emrail that it would call an event of default, to classify and report Emrail's account with KFH as a special attention account under the Bank Negara Malaysia Central Credit Reference Information System ("CCRIS") and to pursue recovery action against Emrail unless all outstanding sums under the facilities were repaid by 31 December 2019.

A **The Appellants' Submissions**

[59] We heard lengthy oral submissions and we were also regaled with equally lengthy written submissions. We believe no injustice will be visited upon any party by us not enumerating each and every aspect of the submissions. We should like to say that both parties have gone into detailed
B submissions, one assailing and the other defending, the findings of the learned JC on the refusal to grant the injunctive reliefs as well as the *Erinford* injunction. We have, during oral arguments, asked learned counsels to confine their arguments to the points in contention, yet counsels insisted on being allowed latitude and to satisfy the rules of natural justice we have
C graciously allowed them to so do. The appellants had pressed before us that its case is that KFH's failure to timeously issue a compliant performance bond ("compliant PB") had prevented payment to Emrail for works carried out worth RM59.1 million under the LRT 3 Project.

[60] In brief, it is contended that KFH's obligation included the provision
D of a performance bond in the prescribed format to Prasarana to secure performance of Emrail's works under the LRT 3 project. The provision of a compliant performance bond was both an express and implied term of the facilities as it was a necessity to give the transaction its business efficacy.

[61] Despite the above, KFH refused to issue a complaint PB purportedly
E on the basis that the same was not Syariah compliant. KFH's non-compliant performance bond was subsequently (rejected) by MRCBGK. KFH only issued a compliant performance bond on 14 November 2018, after a lapse of nine months from the original deadline for the same. This was despite KFH being well aware that Emrail will not be paid for works carried out
F under the LRT 3 project.

[62] In consequence, Emrail has not been paid for works done in the sum of RM59 million and the payment of RM59 million was assigned to KFH toward repayment of the facility and would have been sufficient for the settlement of the same with a surplus for Emrail.
G

[63] The appellants contended that 13 grounds of appeal had been raised in the memorandum of appeal. We do not, at this stage find it necessary to hearken to each of the grounds. We do note however that they relate both to facts as well as the law. Learned counsel for the appellants has also gone
H to great length in his submissions seeking to attack what he said as the finding of the learned Judicial Commissioner. Learned counsel complained that the Judicial Commissioner was plainly wrong in finding that the prescribed format sent to KFH by email on 4 December 2017 did not impose an obligation on KFH to issue the performance bond in the prescribed form is untenable as:
I

(i) The email was clearly connected to the provision of the compliant PB given that the subject matter of the email was "contract and bonds format" and the attachment was "LRT 3-SYS-304-Vol 11-Sec 2, APP 2A Performance Bond.pdf";

(ii) Further the prescribed form of the PB attached to the Emrail was addressed to Prasarana and MRBGK and headed "Construction and Completion of LRT Line 3 from Bandar Utama to Johan Setia LRT 3-SYS-304 Trackwork and Power Conductor Rail System;

(iii) The prescribed form had been attached to the contract documents for the LRT 3 project which was sent to KFH in November 2017 before the execution of the facility documents.

[64] Learned counsel also argued that the learned Judicial Commissioner is completely wrong to heavily rely on the term in the facilities which provided that the performance bond must be in a form acceptable to KFH. In doing so, the learned JC, submits the appellants, erroneously disregarded the course of conduct between parties which showed that the format of the performance bond was known to KFH from 20 November 2017 and was never challenged when the 19 January 2018 letter of offer was issued on 30 January 2018 and the security agreements were executed.

[65] As such, it was contended by learned counsel that KFH's refusal to issue a compliant PB led to Emrail being in breach of its contract with Prasarana dan MRCBGK and further prevented certification and payments of Emrail's interim payment applications ("IPAS").

[66] Learned counsel for the appellants was at pains to draw to our attention the following paragraphs of the learned JC's grounds of judgment:

> I find favour with the Respondent's submission that there is uncertainty or *gharar* in a performance bond which referred to an Articles of Agreement which did not exist. The Federal Court in the case of *JR1 Resources Sdn Bhd v. Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, Interveners)* (2019) 3 MLJ 561 had in its judgment held that the civil courts were not sufficiently equipped to make findings on Islamic Law. Therefore, the learned JC ought not to have decided whether the issue of *gharar* obtained in the factual matrix of the case.

[67] We were also sought to be educated with various authorities to underscore the proposition that a lender may not profit from its own default by its own breach of contract, negligent and unconscionable conduct – see *CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor* [2019] 2 CLJ 1 and *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; [2007] 5 MLJ 697.

[68] In sum, the appellants submitted that there is a need to preserve the position of the appellants pending trial, otherwise the appeal will be rendered nugatory.

The Respondent's Submission

[69] The respondent's counsels too sought to cover all angles of arguments. It was contended that the principal dispute on the wording of the performance bond is a non-issue for two reasons, first that there is great doubt there was any representation on the acceptance by KFH on the performance bond template. Secondly, the communication and representations on the format, if at all such had occurred, they occurred prior to the execution of the security documents and upon the execution of the agreements the communications or representations are automatically superseded. On 19 January 2018, KFH and Emrail SB entered *Kafalah* bank guarantee agreement under *Kafalah* bank guarantee agreement, which contained the following term:

> 8. **ENTIRE AGREEMENT**
>
> This *KAFALAH* BG-1 Agreement and the schedules hereto shall constitute the entire contract between KFHMB, *and all or any representations by KFHMB or its agent or servants in respect of the Kafalah BG-1 Facilities prior to the execution of this Kafalah BG-126 Agreement are deemed to be superseded hereby, unless expressly incorporated herein.* (emphasis added)

Further, under the *Kafalah* bank guarantee dated 30 January 2018, the bank guarantee is defined as follows:

> Mean the *Kafalah* Bank Guarantee issued by KFHMB at the request of the Customer **in the form and addressed to a statutory bodies and private companies acceptable to KFHMB.** (emphasis added)

[70] Therefore, on the authority of *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596; [2005] 3 MJ 585, it was forcefully argued that the contract does not permit any term to be implied or import any other consideration not in the contract. Put it differently, the respondent submitted that no terms could be implied in the contract between Emrail and KFH, including:

(i) any term in any contract that Emrail may have with Prasarana or MRCBGK;

(ii) that the performance bond must comply with the request of third parties.

[71] In respect of the appellants contention on the negligence issues, more particularly where KFH should have discharged its duties in scrutinising the performance bond template, the respondent now argues that no such breach had occurred. It is argued that all KFH did was to comply with the Syariah

principle. In fact, according to learned counsel, until 9 November 2018, Emrail failed to eliminate the element of *gharar*, or uncertainty, in the performance bond after all *gharar* has been accepted to be repugnant to the Syariah principles and must be avoided in all transactions – *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* [2018] 6 CLJ 683). In addition, there was no link of causation between the purported breach and the alleged loss suffered by the appellants.

[72] The respondent further submits that the relationship between Emrail and KFH is one of banker and customer and it is trite that the obligation of the customer to make payment on the amount due is a separate and distinct from the issue of breach of the financing contract by a lender and that in any case the liability to repay the loan will remain *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495; [1993] 2 MLJ 76), *Malayan Banking Bhd v. Perniagaan Sri Nuranuri Sdn Bhd & Ors* [2014] 1 LNS 853; [2015] 1 MLJ 29). Accordingly, even if there is a finding on implied terms as well as reach of any of those terms, the existence of a claim for damages is no bar for KFH to recover the monies disbursed under the Islamic Financing Facilities.

[73] On the issue of legitimate expectation in that the appellants were entitled to and had a reasonable and legitimate expectation that KFH would timeously issue a performance bond in the prescribed form to facilitate certification of the interim payment application and application of the contract proceeds towards payment of the commissions/fees and repayment of the Islamic Financing Facilities according to the term therein, it is submitted that legitimate expectation is a concept alien to commercial transactions and only applies in public-law *GPQ Sdn Bhd v. Constant View Sdn Bhd* [2017] 1 LNS 821; [2017] 6 MLJ 728.

[74] Learned counsel further pointed out that it is not seriously disputed that Emrail is currently in financial problems and has no resources to pay the amount outstanding under the facilities and once this is established KFH must adhere to the dictates of the Central Credit Reference Information System (CCRIS) which includes:

(i) Pursuant to para. 21.1(f) of CCRIS Guideline, to submit to Credit Bureau through CCRIS, an update of customer details, credit account, collated information, legal action information, month-end balances and provisions;

(ii) Pursuant to para. 24.15(f) of CCRIS Guideline, to submit to credit Bureau through CCRIS, an update of credit position of a customer; and

(iii) Pursuant to paras. 25 and 26 of CCRIS Guideline, to submit to Credit Bureau through CCRIS month-end balances for all customers.

and at the present moment, the credit report for Emrail does not reflect its accurate credit status, in particular, that Emrail has no ability to pay the amount outstanding under the facilities and has in fact defaulted on 31 December 2019.

[75] For reasons stated above, the respondent submits that appellants have not shown any triable issues either on contract or negligence or on the footing of unconscionable conduct and thus is not entitled to the reliefs sought.

[76] In amplification of its position, the respondent also submitted that the undertaking given by the appellants, if at all is required to be weighed, is worthless and valueless as Emrail had not adduced any evidence to credibly demonstrate its creditworthiness. On the contrary the respondent has adduced evidence, which was not seriously challenged, which showed that Emrail is in dire straits, financially. On the issue of prejudice to other appellants, learned counsel submitted that despite the reports on the defaults of Emrail, second appellant remain as Chief Justice of Dubai International Financial Centre and third and fourth plaintiffs remains in their respective positions in private and public companies. This shows that the appellants' contention that the report on CCRIS would affect their respective position was nothing but a red herring. It was rhetorically put that if the second appellant feels uncomfortable or wants to protect the name of the country, he himself should have resigned from the post in the early stage of this suit, after all the interest of the country must come first.

Our Decision

[77] We note that in dismissing the application for injunctive relief, the court held the followings:

(i) That Emrail has the obligation to repay the facilities regardless of whether the contracts proceeds are paid by MRCBGK. This is how the learned JC puts it:

> [81] Upon examination of the Facilities Agreement and the Deed of Assignment, *I find that the 1st Plaintiff has the obligation to repay the Facilities regardless of whether the Contract Proceeds are paid by MRCBGK.* The provisions which relate to the Plaintiffs' obligation to repay the Facilities are found in the Facilities Agreement and the agreements relating to the facilities that the financing were disbursed under which are the Murabahah Letter of Credit-I Agreement and the MTQ Agreements dated 30.01.2018.

(ii) That there is uncertainty or *gharar* in a performance bond which referred to an articles of agreement which did not exist:

[100] I find favour with the Defendant's submission that there is uncertainty or gharar in a performance bond which referred to and Articles of Agreement which did not exist … Thus the defendant needed to be sure what it was guaranteeing which was the purpose of suing the performance bond. The Defendant needed to be certain of the validity of the performance bond to avoid legal action by MRCBGK or Prasarana in the event the performance bond is declared to be void.

(iii) That KFH cannot be restrained from calling an event of default which would be a prelude to KFH's recovery of the facilities and consequently reporting to CCRIS:

[106] In concluding, in any event applying the principle that a breach by the bank does not absolve or exempt the customer from liability to pay the amount outstanding under the Facilities as decided *Mae Perkayuan Sdn Bhd & Ors* (*supra*). *The Defendant cannot be restrained from calling on Event of Default which would be a prelude to the Defendant's recovery of the Facilities and consequently reporting to CCRIS.*

[107] I am thus satisfied that no *bona fide* serious issue to be tried has been established by the Plaintiffs.

[78] With regard to the *Erinford* Injunction, the High Court in dismissing the application held that:

(a) I find that the balance of convenience *does not lie in favour of the Plaintiffs;*

(b) I accept the Defendant's floodgate argument. *Allowing the Erinford Injunction would set a precedent for other defaulters to apply for an injunction against the reporting of CCRIS* which does not bode well for our financial system and economy with inaccurate credit reports in CCRIS. *During this Covid-19 pandemic, financial institutions are even more reliant on accurate data;*

(c) *The damage to the Plaintiffs should the CCRIS classifying and reporting not be restrained cannot compare to the negative macro effects to the banking and financial system* should the CCRIS classifying and reporting not be restrained;

(d) Tun Zaki, Tan Sri Hari and Amrish, *stepping down as directors of the public listed and private companies and members of professional bodies is speculative. There is no evidence that they will have to do so if reported to CCRIS or an event of default is called by the Defendant. In fact, Tun Zaki, Tan Sri Hari and Amrish remain in their positions in private and public companies despite reports on the payments overdue to date.*

(e) In the event the calling of default and reporting to CCRIS of the new LRT 3 Contract as well as other banking facilities of each of the Plaintiff, *This can be compensated by damages.*

[79] We have given the above submission our most anxious and careful consideration. In essence what we have before us is an appeal against the refusal for an injunction although learned counsels for both parties approached the application from the standpoint of *Erinford* Injunction and its principles. On this we should like to state that it is well accepted that there is nothing new about the *Erinford* Injunction. In fact the basis on which that injunction was issued is traceable to the case of *Wilson v. Church* (1879) 11 Ch D 576.

[80] Learned counsel for the respondent, in his opening gambit, canvassed that, the exercise of discretion by the learned JC was beyond reproach and this will also bind the hands of this court from exercising its discretion to entertain an appeal therefrom. We have no hesitation in expressing serious reservations on the correctness of this proposition. We find that on further scrutiny, it is an argument that is reminiscent of that which was raised in the case of *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 448 which Megarry J rejected.

[81] It is to be remembered that in hearing this appeal, reference may also be made to s. 44 of the CJA which invests the Court of Appeal with the power to make "interim order to prevent prejudice to the claim of parties" pending the hearing of the appeal. In our judgment, this power is wide and should not be circumscribed by any limitation that is not specifically stated. Put it differently, unless there are limits specified in the statute for the exercise of the power there is no reason for the provision to be read or implied to limit that power. Accordingly, we find no logical reason for us to limit that power. Accordingly, the refusal of an *Erinford* Injuction at the court below, cannot, in our judgment, *ipso facto*, operate as a bar to an application under s. 44 of the CJA at the Court of Appeal. That said, we must also reiterate that the power is always exercisable when the circumstances are fit and proper. In the present case, we find that we ought to exercise that power and we do so. More so in an appeal from an interlocutory application the Court of Appeal is certainly entitled to hear the matter afresh by way of rehearing and accordingly we have done so.

[82] With respect to learned counsel for the respondent, we are unable to agree that there are no issues to be tried. For one, in our judgment the entire claim by the appellants is not of spurious nature and that based on the examination of the pleadings the issues raised merit careful consideration. We find that, at this juncture, the issues relating to negligence and the breach of contract relating to the issuance of the performance bond are live issues which cannot be ignored or brushed aside simplistically either on an entire agreement clause or compliance with Central Bank's requirements. We also find that the argument on the existence of uncertainty or *gharar* is yet another triable issue which has to be decided upon mature arguments and credible

evidence. More particularly the question will be whether *gharar* is made out in the factual matrix of this case. We find that the finding of *gharar* is with respect, too premature. That, to our mind, is a conclusion that must be made upon full arguments and evidence.

[83] On the issue of balance of convenience, we agree with learned counsel that the appellants would suffer great injustice if interims orders were not made. In our view, the classification under CCRIS would damage Emrail's credit rating, its ability to secure project financing and may trigger a cross-default on the appellants' banking lines with various other lenders. It is our considered opinion that when a company's account is classified as a special attention account, no financial institution would afford the company financial loans or assistance which would commercially cripple the company. Thus, it is abundantly clear that KFH would only suffer a delay in payment which can be compensated by adequate payment as to interest. The granting of this interim order, in our view, would not open a floodgate for all other defaulters as each case will have to turn on its facts.

[84] We also find that there is merit in the submission that the other appellants will be gravely prejudiced if no interim orders are made. As we have stated earlier the prejudice of these appellants would far outweigh the prejudice of the respondent which is purely financial which is computable and is capable of being clawed back by restitution and compensation in terms of profits unearned.

Conclusion

[85] In conclusion, we are of the considered opinion that the High Court's decision cannot be sustained and is therefore set aside. We substitute it with the following orders, on the usual undertakings by the appellants:

(i) That the respondent, its directors, servants, and/or agents be restrained from classifying and reporting the first appellant's account with the respondent as a special attention account under the Central Credit Reference Information System ("CCRIS") with BNM pending the trial and the disposal of the appellants' claim in the civil suit; and

(ii) That the respondent, its directors, servants, and/or agents be restrained from calling an event of default and/or demanding payment of the Islamic Financing Facilities pending the trial and the disposal of the appellants' claim in the civil suit.

[86] The appellants are also entitled to costs which we fixed at RM20,000 subject to allocator. We so order.